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# Workmen's Compensation

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This seventh survey covers the legislative changes to our Workmen's Compensation Act[1] which were adopted by the 1967 session of the Florida Legislature and all reported judicial decisions since publication of the last survey.[2]

The 1967 Legislature effectuated little change in our Workmen's Compensation Act. The principal modification was in increasing the maximum weekly benefits from $42.00 per week to $49.00 per week,[3] effective December 31, 1967, and in placing a dollar limitation on death benefits payable which, in effect, deprives the recipients of death benefits of the beneficial increases established by the increase in weekly maximum dollar benefits payable.[4] The trier of fact, previously entitled "Deputy Commis-

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1. FLA. STAT. ch. 440 (1967).

2. The last survey covered the 1965 session of the Florida Legislature and judicial decisions reported from Volume 151, SOUTHERN REPORTER 2d Series up to and including Volume 175, SOUTHERN REPORTER 2d Series. This survey covers those reported decisions beginning with Volume 176, SOUTHERN REPORTER 2d Series up to and including Volume 198, SOUTHERN REPORTER 2d Series. For prior survey articles, *see* Burton, *Florida Workmen's Compensation—1935-1950*, 5 MIAMI L.Q. 74 (1950); Clements, *Workmen's Compensation*, 8 MIAMI L.Q. 469 (1954); Schroll, *Workmen's Compensation—1954-1959*, 14 U. MIAMI L. REV. 154 (1959); Schroll, *Workmen's Compensation*, 16 U. MIAMI L. REV. 216 (1961); Schroll, *Workmen's Compensation*, 18 U. MIAMI L. REV. 398 (1963); Schroll, *Workmen's Compensation*, 20 U. MIAMI L. REV. 277 (1965).

3. FLA. STAT. § 440.12(2)(3) (1967).

4. FLA. STAT. § 440.16(2) (1967).

sioner," received a change of title by the 1967 Legislature and is now called "Judge of Industrial Claims."[5] Along with the change of title, Deputy Commissioners were granted a salary increase to 17,500 dollars effective July, 1, 1967,[6] and were relieved of the obligation of including reasons or justification for the mandate contained in their orders.[7] Salary changes were also effectuated for the two members of the Full Commission other than the Chairman.[8]

One hundred ten judicial opinions were handed down by the Supreme Court of Florida and the district courts of appeal during the period surveyed. During the same period, an additional 282 orders of the Full Commission were brought to the Supreme Court of Florida by petition for writ of certiorari which the court declined to grant.[9] The subject matter covered by this survey will again be presented by topics rather than by the chronological ordering of cases.

## I. Special Disability Fund

The Special Disability Fund[10] received little interpretation during the period surveyed. In *United States Fidelity & Guaranty Company v. Florida Industrial Commission and Special Disability Fund*,[11] an employee having a pre-existing loss of sight in the left eye sustained an accident resulting in twenty-five percent permanent partial orthopedic disability. The claimant was found to be permanently and totally disabled as a result of the twenty-five percent orthopedic disability, coupled with permanent total psychiatric disability. The psychiatric disability was in part attributable to a subsequent loss of vision in the right eye which reduced the claimant to total blindness. In reversing the denial of reimbursement from the Special Disability Fund, the court found that the loss of vision in each eye separately remained a contributing factor in total blindness and a causative factor in producing the psychiatric disability with which the disability attributable to the current injury merged. The employer, having had knowledge of the pre-existing left eye blindness, was held to be entitled to resort to the Special Disability Fund for reimbursement.

In *Kirkman v. Owens-Illinois Forest Products*,[12] an employee was found to be permanently and totally disabled as a result of two accidents. The Deputy held the provisions of the Special Disability Fund to be applicable. On review, the Full Commission reversed, stating that the

5. Fla. Stat. § 440.02(8) (1967).
6. Fla. Stat. § 440.45(3) (1967).
7. Fla. Stat. § 440.25(3)(c) (1967).
8. Fla. Stat. § 440.44(2) (1967); Fla. Stat. § 443.11(1) (1967).
9. The 1965 survey disclosed that one hundred and ten judicial opinions were handed down by the Supreme Court of Florida and the district courts of appeal, the supreme court denying certiorari without opinion in an additional one hundred and fourteen cases.
10. Fla. Stat. § 440.49(4) (1967).
11. 197 So.2d 1 (Fla. 1967).
12. 197 So.2d 822 (Fla. 1967).

Deputy should have apportioned and awarded disability for the latter accident alone. In holding that the Full Commission was correct in its finding that the Special Disability Fund was not applicable, the supreme court stated that the doctrine of apportionment was not indicated and therefore, there was no need to resort to the Special Disability Fund. In this case, full responsibility was imposed upon the employer.[13]

## II. APPORTIONMENT[14]

The doctrine of apportionment has undergone drastic judicial revision during the period surveyed, by virtue of the supreme court's opinion in the case of *Evans v. Florida Industrial Commission*.[15] Prior to the *Evans* decision, the court had held the doctrine of apportionment to be applicable to a pre-existing asymptomatic injury suffered in some unknown or forgotten place and rendered symptomatic by a subsequent industrial accident,[16] and to an undiagnosed pre-existing arthritic condition the aggravation of which caused a claimant to be reduced to permanent total disability.[17] The facts in the *Evans* case induced the court to review many of its prior decisions requiring apportionment where there are pre-existing disease conditions, as well as many of its earlier decisions stating that pre-existing conditions need not necessarily require apportionment. All prior decisions inconsistent with the rule of the *Evans* case have been modified.

In the *Evans* case, the claimant injured his back in 1961. After a period of conservative treatment, he was discharged and returned to work with no residual disability. Approximately one year later and while in the same employ, he reinjured his back in a second compensable accident. After treatment, including surgery, it was determined he had reached maximum medical improvement with a permanent disability rating of twenty-five percent of the body as a whole. Claim was filed for both accidents and following hearings, the Deputy Commissioner found the claimant to be permanently and totally disabled and awarded benefits accordingly. On review, the Full Commission reversed the award of permanent total disability and held that apportionment of the benefits was required. In granting certiorari, the Supreme Court of Florida found there was competent, substantial evidence to support the award of permanent total disability and further held apportionment not applicable. The court stated that the purpose of the apportionment provisions of Florida Statutes, section 440.02(19) is to relieve the employer of the obligation for that portion of disability which is not the result of an industrial accident, but

13. The court's decision in the *Kirkman* case was based on its earlier decision of Stevens v. Winn-Dixie, Case No. 34,131. The *Stevens* case has not yet been reported in the SOUTHERN REPORTER series and, as a consequence, is not part of this survey.

14. FLA. STAT. § 440.02(19) (1967).

15. 196 So.2d 748, 752 (Fla. 1967).

16. Simmons v. City of Coral Gables, 186 So.2d 493 (Fla. 1966).

17. Milne v. Florida Indus. Comm'n, 188 So.2d 798 (Fla. 1966).

which is in some way attributable to a pre-existing disease or condition in the medical sense. The court went on to state:

> [I]n cases in which a pre-existing disease is aggravated by industrial injury, the resulting disability, determined as of the time of the award, is to be considered as falling into three categories: (1) that which resulted directly and solely from the accident and which would have occurred even in the absence of the pre-existing disease; (2) that which resulted from the acceleration or aggravation of the pre-existing disease by the accident; and (3) that which resulted from the normal progress of the disease and would have existed had the accident never occurred. Disability falling within the first two categories are compensable under the terms of the Statute. It is the purpose of Section 440.02(19) to relieve the employer of disability within the third category by apportioning it out of an award.

Apportionment was thereby held to be proper only when, and to the extent, a pre-existing disease either, (1) was disabling at the time of the accident and continued to be so at the time the award is made, or (2) was producing no disability at the time of the accident but through its normal progress is doing so at the time permanent disability is determined and an award is made. The effect of the *Evans* case is to place full responsibility on the employer for that disability which the accident caused and to relieve the employer for that degree of disability which is entirely unrelated to the accident and which was disabling at the time of the accident or became disabling through its natural progression, unaffected by the accident. If the employer had notice of the pre-existing disability, the claimant would also receive full benefits by virtue of the provisions of the Special Disability Fund.

In *Thompson v. Swift and Company*,[18] the question of apportionment was held not to be one of law, but rather one of fact to be determined by the Deputy. In *Crosby Aeromarine Company v. Wilson*,[19] a workman had sustained a fifteen percent permanent partial disability of his right leg for which compensation was awarded. The employer and carrier sought review, contending that eight years prior to the industrial accident giving rise to the fifteen percent disability of the leg, the same claimant had sustained an injury to the same leg which resulted in a twenty percent disability for which he had been paid. In affirming the award, the court held that no part of the fifteen percent functional impairment present after the second injury was attributable to the first injury. A similar award of twenty-five percent disability was affirmed. This did not include a pre-existing condition of osteo-arthritis which was neither connected to nor aggravated by the industrial accident.[20] The fact that a disabled

18. 198 So.2d 826 (Fla. 1967).
19. 198 So.2d 15 (Fla. 1967).
20. Clark v. Western Knapp Eng'r Co., 190 So.2d 334 (Fla. 1966).

workman sustains greater disability as a result of either a preceding non-related disabling condition or a subsequently incurred non-compensable condition does not preclude an award for the effects of the industrial injury itself.[21]

In *Jordan v. Florida Industrial Commission*,[22] the claimant had sustained a pre-existing accident resulting in a fractured leg which healed in an abnormal angle shortening his leg by 2¼ inches, giving him a limp, curvature of the spine and abnormal stress on the leg muscles, tendons, etc. This deformity did not interfere with or prevent adequate performance of his duties. Subsequently, the claimant suffered a job-connected accident resulting in a back injury. As a result of the abnormal stress on his back caused by the earlier leg deformity, claimant's back could not be properly treated for the latter injury, the only effective treatment being correction of the pre-existing leg length discrepancy. In reviewing the denial by the Deputy of medical care for the pre-existing deformity, the Supreme Court of Florida held that the facts did not depict an aggravation of a pre-existing injury so as to require apportionment between the two injuries, but rather that the pre-existing leg deformity retarded and prevented recovery from a compensable injury. The court reversed the Full Commission's affirmance of the Deputy's denial of benefits and ordered the employer to bear the cost of returning the claimant to an employable status by furnishing him with that degree of compensation and medical care necessary to effectuate recovery from his back injury including correction of the pre-existing deformity.

Apportionment has been denied where there is no evidence to support apportionment or where it is impossible to utilize the doctrine.[23] Pre-existing psychiatric conditions have also been held not to be subject to the apportionment doctrine.[24]

## III. HEART CASES

The requirement of a showing of unusualness of exertion resulting in heart attacks, established by the rule of *Victor Wine*[25] has been adhered

21. Kurtz v. Walls, 182 So.2d 618 (Fla. 1966); Conrad v. Six L's Packing Co., 182 So.2d 616 (Fla. 1966).

22. 183 So.2d 529 (Fla. 1966).

23. Hardware Mut. Cas. Co. v. Sutton, 197 So.2d 502 (Fla. 1967); Conrad v. Six L's Packing Co., 182 So.2d 606 (Fla. 1966) (no evidence of apportionment); G. & L. Motor Corp. v. Taylor, 182 So.2d 609 (Fla. 1966); Hastings v. City of Fort Lauderdale, 178 So.2d 106 (Fla. 1965) (impossible to apportion award of death case due to vintricular fibrillation).

24. Warren Barr Supply Co. v. Taylor, 182 So.2d 14 (Fla. 1966). *Compare with* Hardware Mut Cas. Co. v. Sutton, 197 So.2d 502 (Fla. 1967), where the failure to apportion the claimant's psychiatric disability was affirmed based on insufficient evidence to establish pre-existing psychiatric condition.

25. Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581, 588 (Fla. 1961), wherein the court announced the following rule for heart cases:

> When disabling heart attacks are involved and where such heart conditions are precipitated by work connected exertion affecting a pre-existing non-disabling heart

to by the courts. In *Simmons v. Stanley*,[26] a miocardio-infarction occurred following the stacking of 100 to 125 cases of canned goods, which, the claimant admitted, was not an unusual exertion for him. An award of compensation was reversed for failure to show unusualness in activity and competent, substantial evidence to support a causal relationship with the activity itself. Heart attacks caused by exertion in pushing an automobile for an employee customarily engaged in sedentary employment,[27] and attacks produced by unusual activity accompanied by unusual climatic conditions have also been held compensable.[28] The unusualness of the activity is a question for the trier of fact to determine. In *Hastings v. City of Fort Lauderdale Fire Department*,[29] a city fireman was engaged in a *large* fire drill. Near the end of the drill, the claimant was found lying along side of the fire truck. No one saw him fall, but circumstances indicated he had fallen from the cab of the truck while engaged in backing the truck and holding open the left door. Approximately thirty minutes after he was found, the claimant was pronounced dead upon arrival at a hospital. On review, the Supreme Court of Florida affirmed the Deputy Commissioner's finding of unusualness in the activity producing the heart attack. The opinion, however, was not unanimous. The dissenting member of the court thought that the *Victor Wine* Rule was not adhered to in that there was no showing of unusualness in the activity. The majority opinion gave judicial recognition to medical distinctions in "heart cases" and noted that the *Victor Wine* Rule came about in a heart case where the disability was due to a coronary occlusion, whereas the death in the instant case was the result of ventricular fibrillation or arrhythmia. Although emphasis was placed on the medical distinction, the opinion does not reflect the relevancy thereof to the *Victor Wine* Rule or to the doctrine of apportionment in that unusualness in the activity was found to have occurred and it was impossible to utilize the doctrine of apportionment under the testimony.

Heart attacks not caused by the original accident but which are the natural and direct result of the initial injury were held compensable where the initial injury was due to heat prostration or exhaustion,[30] and where the initial accident produced a back injury and respiratory difficulties which combined with anxiety occasioned by anticipation of spinal surgery to cause, in part, a heart attack.[31] However, in *Apgar & Markham Construction Company v. Golden*,[32] an unbroken chain of causation for a

disease, injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing.

26. 197 So.2d 514 (Fla. 1967).
27. G. & L. Motor Corp. v. Taylor, 182 So.2d 609 (Fla. 1966).
28. Peltier v. H.H. Barbour, 190 So.2d 569 (Fla. 1966).
29. 178 So.2d 106 (Fla. 1965).
30. Petitt v. Ben F. Walker Framing Co., 176 So.2d 897 (Fla. 1965).
31. Herrin Transp. Co. v. Cothren, 180 So.2d 338 (Fla. 1965).
32. 190 So.2d 323 (Fla. 1966).

claimant's heart disability was not found to exist due to the illusory nature of the evidence bearing on causal connection. In that case, a back injury occurred on May 27th, and on June 17th the claimant was picked up on a city street in a comatose condition and admitted to a hospital where he was found to have suffered a heart attack. The evidence which attributed the heart attack to the back injury was based solely on the claimant's testimony of economic anxiety which followed his back injury. The court held that under the circumstances of the case, the heart attack was indirect rather than direct and declined to find the heart attack compensable based solely upon economic anxiety. The evidence disclosed that the majority of the claimant's anxiety occurred following the heart attack rather than during the short period of time which passed between his back injury and the attack itself.

## IV. DISABILITY BENEFITS[33]

### A. *Occupational Diseases*

In *Richardson v. Honeywell, Inc.*,[34] a claimant had sustained a condition diagnosed as capsulitis which the Deputy Commissioner found was caused by repeated stretching and stress to the claimant's right ankle while operating a vacuum pedal with her right foot. He awarded compensation based on the theory that the condition was the result of an occupational disease. On review, the Full Commission reversed the award as a matter of law, concluding that the claimant sustained neither an accident nor an occupational disease. The decision of the Full Commission was affirmed by the Supreme Court of Florida without opinion.[35]

Skin cancers produced as a result of exposure to the sun by a claimant employed as a life guard were found compensable by the Deputy Commissioner under the occupational disease theory. On review, they were found not compensable by the Full Commission. The Supreme Court of Florida affirmed the decision of the Full Commission, stating:

> In affirming the Order on this point, we note that our affirmance is limited to the particular facts of this case. We are not announcing here a general rule of law applicable to all skin cancer cases or excluding the possibility they may be compensable occupational diseases in particular Workmen's Compensation cases."[36]

An award of compensation for a dermatitis condition under the oc-

33. FLA. STAT. § 440.15 (1967).

34. 188 So.2d 303 (Fla. 1966).

35. The facts in this case may be obtained from the dissenting opinion of Justice Paul D. Barns who felt the claimant's condition was compensable. Richardson v. Honeywell, Inc., 188 So.2d 303, 304 (Fla. 1966).

36. Braden v. City of Hialeah, 177 So.2d 235, 236 (Fla. 2d Dist. 1965).

cupational disease sections of the Workmen's Compensation Act was also reversed for lack of competent substantial evidence to support the award in *Screen Art Posters, Inc. v. Quinn*.[37] In this case, it is interesting to note that the court pointed out that the award of disability itself was unsupported by the record inasmuch as the claimant had not suffered any loss of capacity to earn wages in any other work which he could perform.[38]

### B. *Temporary Benefits*

In *Chastain v. Union News Division of the American News Company*,[39] the reversal of an award of permanent total disability was upheld where a claimant had reached maximum medical recovery from her orthopedic injuries but continued to be temporarily disabled and in need of medical care as a result of a psychiatric disorder diagnosed as a conversion neurosis.

The statutory minimum of eight dollars per week[40] was held to be applicable to temporary partial disability awards in *Crosby Aeromarine Company v. Wilson*.[41]

### C. *Permanent Benefits: Scheduled Injuries*

The method of determining the amount of compensation where phalanges of a digit or parts thereof are lost due to an industrial accident under Florida Statutes, section 440.15 (3) was set forth in the case of *Fernandez v. Anheuser-Busch, Inc.*[42] In that case, it was held that where compensation is sought for loss of use of a phalange, it must be measured in terms of loss of use of the finger or toe, not the phalange. Loss of the first and any part of the second phalange merits compensation for loss of the entire digit. When half or more of a distal phalange is lost, the court went on to state that the statutory fifty percent rule would be invoked.

An award of permanent total disability resulting from two scheduled injuries was reversed in *Dixie Lime and Stone Company v. Lot*,[43] because of the claimant's failure to make legitimate efforts to obtain employment.

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37. 198 So.2d 324 (Fla. 1967).

38. FLA. STAT. § 440.151(3) (1967) defines disablement as becoming actually incapacitated partially or totally because of occupational disease from performing work in the last occupation in which injuriously exposed to the hazards of such disease. "Disability" means the state of being so incapacitated. The opinion in Screen Art Posters, Inc. v. Quinn, 198 So.2d 324 (Fla. 1967), indicates disability to be considered in terms of any work rather than inability to perform the last work in which the occupational disease was incurred.

39. 194 So.2d 899 (Fla. 1966).

40. FLA. STAT. § 440.12(2) (1967).

41. 198 So.2d 15 (Fla. 1967).

42. 197 So.2d 489 (Fla. 1967).

43. 196 So.2d 422 (Fla. 1967).

### D. *Permanent Benefits: Wage-Earning-Capacity Loss Cases*

The majority of the wage earning capacity loss cases decided in the period surveyed were governed by case law prior to the 1965 amendment to Florida Statutes, section 440.15(3)(u). This amendment obviated much of the litigation which took place where there was a permanent physical impairment resulting from an industrial accident, but the claimant was able to earn the same or greater wages, even with the permanent physical impairment. A sustained work record of earnings substantially equivalent to that received prior to the accident was held to necessitate a finding of no permanent disability,[44] while in other decisions, it was held that earnings of the same or greater wages subsequent to an injury was only one factor to be considered with others in determining loss of wage earning capacity.[45] The difference between wage earning capacity loss and medical disability was emphasized in the case of *Maldonado v. Keller Metal Products*,[46] wherein the claimant was held to be entitled to spinal surgery which would not improve his medical disability, but which would improve his wage earning capacity.

Five cases were reviewed by the Supreme Court of Florida wherein the issue was permanent total disability. Permanent total disability was denied in two cases where the employee made no real attempt to find work.[47] A thirty-eight-year-old exotic dancer who lost one leg as a result of an accident, who was sick and depressed and deprived of her means of earning a livelihood, was held to be permanently and totally disabled[48] as were two claimants who were suffering from twenty-five percent physical impairments.[49]

## V. MEDICAL BENEFITS

Medical benefits have been extended to include treatment for preexisting deformaties[50] not aggravated by industrial accident but whose existence precludes the healing of the compensable injury.[51] Under certain circumstances, out-of-state medical care has been held appropriate as have been awards for unskilled nursing care.[52]

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44. Oliveros Motor Serv., Inc. v. Libert, 184 So.2d 180 (Fla. 1960). Pratt & Whitney Aircraft v. Golas, 192 So.2d 759 (Fla. 1966) (functional disability prior to the 1965 amendment held to be insufficient as sole basis of determining disability).

45. Kurtz v. Wall, 182 So.2d 618 (Fla. 1966); Kuhle v. Kirak, 177 So.2d 324 (Fla. 1965).

46. 185 So.2d 702 (Fla. 1966).

47. Dixie Lime & Stone Co. v. Lott, 196 So.2d 422 (Fla. 1967); Clark v. Western Knapp Eng'r Co., 190 So.2d 334 (Fla. 1966).

48. Hardware Mut. Cas. Co. v. Sutton, 197 So.2d 502 (Fla. 1967).

49. Evans v. Florida Indus. Comm'n, 196 So.2d 748 (Fla. 1967); Creighton v. Sears Roebuck & Co., 190 So.2d 762 (Fla. 1966).

50. Jordan v. Florida Indus. Comm'n, 183 So.2d 529 (Fla. 1966).

51. Howell v. Cottage-Ette Mfg. Co., 186 So.2d 1 (Fla. 1966).

52. Henley v. Central Truck Lines, Inc., 178 So.2d 722 (Fla. 1965). *See*, Reynolds v. Florida Mobile Homes, Inc., 195 So.2d 561 (Fla. 1966), where the court remanded the cause to the Full Commission to determine the propriety of the Deputy Commissioner's findings

It is the responsibility of the employer to furnish medical benefits. Where the employee arranges for treatment by himself, he cannot recover for the cost of said treatment unless he has given the employer the opportunity to do so and he has declined.[53] A physician who treats an injured workman but fails to file medical reports with the Florida Industrial Commission within ten days following the first treatment will not recover payment of his billing from the employer or carrier, it having been held that the injured workman shares the responsibility with the physician to see to it that the ten-day filing rule, under Florida Statutes, section 440.13 is complied with.[54] The ten-day filing requirement has been held to be subject to the doctrine of waiver.[55]

Once medical billings have been placed into evidence, it is the obligation of the Judge of Industrial Claims to determine the responsibility therefor and order their payment when responsibility is found to lie with the employer.[56]

## VI. COVERAGE[57]

The statutory exclusion removing agricultural farm laborers from coverage under the Workmen's Compensation Act was limited in the case of *Thomas Smith Farms v. Alday*.[58] In that case, a claimant was injured when he fell from a mule barn he was constructing for his employer, a corporate farmer engaged primarily in growing tobacco. The claimant was a full-time employee hired to repair buildings and tenant houses and to erect new buildings on the farm. He had also engaged in non-carpentry work in the tobacco barn for more than sixty hours during the year. Emphasizing liberal construction, the court affirmed the holding of the Full Commission which reversed a denial of benefits to the claimant. The commission had stated:

> It is the character of the labor performed by the employee that must determine its application [the exemption] rather than the character of the employer's business.

The dual purpose doctrine utilized in determining coverage of employees on the highways again came into focus during the period surveyed. Injuries were held compensable where they resulted from an accident on a trip which was serving both a personal and business purpose,[59] but not

that the Workmen's Compensation Act authorized recovery for nursing where the nature of the injury required such, and the employer had knowledge thereof but refused to provide the care.

53. Hood's Dairy v. Severino, 178 So.2d 588 (Fla. 1965).

54. St. Francis Hosp., Inc. v. Feinberg, 192 So.2d 753 (Fla. 1966); Hood's Dairy v. Severino, 178 So.2d 588 (Fla. 1965).

55. Geiger Distribs., Inc. v. Snow, 186 So.2d 507 (Fla. 1966).

56. Fluellen v. Santini Bros. Inc., 195 So.2d 849 (Fla. 1967); Pratt & Whitney v. Golas, 192 So.2d 759 (Fla. 1966).

57. FLA. STAT. § 440.02(1)(c)(3) (1967).

58. 182 So.2d 405, 406 (Fla. 1966).

59. Levine v. Builders Aluminum Stone Co., 186 So.2d 26 (Fla. 1966).

compensable where the alleged business purpose was trivial,[60] and without the scope of coverage where a deviation occurred.[61]

The tests for determining whether or not an employer-employee relationship exists and whether there will, as a result, be coverage under the Workmen's Compensation Act was set forth in detail in the case of *Cantor v. Cochran*.[62] Among the tests mentioned were control, including the power to fire; whether the one employee was engaged in a distinct occupation or business; the kind of occupation with reference to its supervision; the skill required; whether the employer or workman supplied the tools and place of employment; the length of employment; the method of payment; whether the work is part of the regular business of the employer; whether or not the parties believe they have created the relation of master and servant and whether the principal is or is not in business. In the *Cantor* case, the claimant was engaged in assisting customers in transporting their groceries from the point where the customer paid for groceries to the customer's car or truck. It was on one of these trips that the claimant sustained an injury when a trunk lid fell across his back. Using the tests set forth above, the parties were found to have created the relationship of employer and employee, thereby extending coverage to the claimant.

An attempt to deny coverage to a police academy trainee for alleged misrepresentation of a pre-existing condition on his employment application was denied in the case of *Simmons v. City of Coral Gables*.[63] The basis for the denial was that there was no reason for the claimant to suspect he was suffering a disability when he completed the application forms. A similar result was reached where the claimant was an uneducated negro man, unable to read and write the employment application was filled out by the employee's foreman. It was found that the claimant did not know the representation to be false.[64]

The question of whether accidents had occurred was considered in *Howard v. Department of Public Safety*.[65] A Florida Highway Patrolman was found to have suffered an accident when, while lifting a heavy battery and container from the ground to a Highway Patrol car, the claimant noticed a slight pain of which he made no complaint. A police academy trainee was found to have suffered an accident where the circumstances surrounding his work and the rigid training requirements were causative factors which permitted a pre-existing condition to become symptomatic

60. Everett Ford Co. v. Laney, 189 So.2d 877 (Fla. 1966).

61. Maroney v. Kelly & Sons, Inc., 195 So.2d 208 (Fla. 1967).

62. 184 So.2d 173 (Fla. 1966). *See also* Alter Sales Co. v. Sykes, 190 So.2d 746 (Fla. 1966) (court applied a three-way test in determining employer and employee relationships).

63. 186 So.2d 493 (Fla. 1966).

64. Aron v. Kirk's Lawn Serv., 190 So.2d 759 (Fla. 1966).

65. 187 So.2d 889 (Fla. 1966).

even though he may have suffered the same result in a variety of other situations.[66]

The vexing question of jurisdiction where workmen are injured under circumstances which may afford them coverage under the Florida Workmen's Compensation Act or under one of the federal acts was touched upon in the case of *Atlas Iron and Metal Company v. Hesser*.[67] After reviewing the somewhat conflicting federal decisions, the court quoted the following from a Massachusetts decision of earlier years:

> Probably, therefore, our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic'....

The federal act was held applicable because the Supreme Court had extended it to the full scope of federal maritime jurisdiction.

## VII. Average Weekly Wage

The determination of an average weekly wage is governed by the several standards prescribed by Florida Statutes, section 440.14. When a factual situation in a given case fits a particular statutory standard, the latter should govern to the exclusion of any contrary quasi-judicial discretion. In *Jones Shutter Products, Inc. v. Jackson*,[68] a workman sustained an injury while helping to install hurricane shutters. He was employed in this endeavor for only one day. He maintained regular employment in a dissimilar industry. It was stipulated between the parties that if the average weekly wage of a similar employee applied, the average rate would be one dollar to one dollar and twenty-five cents per hour. In affirming the reversal of a Deputy Commissioner's award, finding claimant's average weekly wage to be ten dollars, the Supreme Court of Florida held that the claimant was not a part-time employee, that the wages he earned in the concurrent dissimilar employment could not be used in determining average weekly wage and that the stipulated wage of a similar employee should be used as the wage base in determining average weekly wage.

The question of whether earnings from concurrent dissimilar employment, properly excluded from average weekly wage, may nevertheless be considered in determining post-recovery earning capacity was decided in the case of *Parrott v. City of Fort Lauderdale*.[69] In that case, the claim-

66. Simmons v. City of Coral Gables, 186 So.2d 493 (Fla. 1966). For a dissenting opinion wherein coverage was denied for lack of a showing of an accident or occupational disease, *see* Richardson v. Honeywell, Inc., 188 So.2d 303 (Fla. 1966).

67. 177 So.2d 199, 202 (Fla. 1965). For another jurisdictional dispute involving coverage, *see* Sikes v. Fort Myers Constr. Co., 191 So.2d 265 (Fla. 1966).

68. 185 So.2d 476 (Fla. 1966).

69. 190 So.2d 326 (Fla. 1966). The opinion in this case contains an excellent review of

ant suffered a compensable injury while employed as a garbage collector, in which employment he had an average weekly wage of about sixty-two dollars. He also had concurrent seasonal earnings of seventy-five to one hundred dollars per week from self-employment. The Deputy Commissioner found the employments to be too dissimilar to be combined for purposes of determining average weekly wage. In awarding disability benefits, the Deputy Commissioner considered the factor that the claimant was able to continue in his self-employment activities, but not able to continue to do the lifting required in his employment as a garbage collector. In reversing the Deputy Commissioner, the court held that if earnings from concurrent employment are excluded for determination of average weekly wage, earnings from that same employment should also be excluded from determination of post-recovery earning capacity. The court went on to caution that greater participation in the concurrent dissimilar employment in the post-recovery period may be considered in determining post-recovery earning capacity loss.

## VIII. STATUTE OF LIMITATIONS

The furnishing of medical treatment after an order has been entered is insufficient to toll the running of the statute of limitations insofar as the compensation or money benefits are concerned. If more than two years pass after the last payment of compensation pursuant to an order, a further claim for compensation benefits will be barred.[70] In those instances where the attending physician discharges a claimant from active medical care, but again wishes to see the claimant for a re-examination at some future date, said future re-examination will be considered part of a continuation of the remedial treatment for the purposes of tolling the statute of limitations.[71]

In *Melbourne Airways & Air College, Inc. v. Thompson*,[72] a widow filed a claim for death benefits on her own behalf as well as on behalf of the minor children of the deceased. The claim was filed more than two years after the date of death. An award of compensation benefits to the minor children and denial of the claim of the widow, based on the running of the statute of limitations, was affirmed. The assertion of the widow that her claim was filed within two years from the "official" establishment of her husband's death was held insufficient.

## IX. THE DEPUTY COMMISSIONER

The Deputy Commissioner, now called Judge of Industrial Claims, has the sole duty and responsibility to ascertain the facts through hear-

the court's prior decisions regarding the combining of wages from concurrent employment for average weekly wage purposes.

70. Jones v. Ludlum Corp., 190 So.2d 760 (Fla. 1966).

71. Mansell v. Mulberry Constr. Co., 196 So.2d 436 (Fla. 1967).

72. 190 So.2d 305 (Fla. 1966).

ings, make findings and enter his compensation order.[73] He must consider all factors, make adequate findings based upon the record before him and adequately resolve the meritorious issues and defenses presented.[74] Findings which are not sufficiently clear, findings which fail to properly substantiate the order and findings which are general rather than particular are insufficient.[75]

Where there is conflict in the evidence, the Deputy Commissioner's rulings on these conflicts will not be disturbed if supported by competent, substantial evidence. The Deputy is the undisputed trier of facts and his province will not be invaded. The rule, giving conclusive correctness to the Deputy's findings on disputed facts does not, however, carry with it a presumption of infallibility as to the conclusions he may have drawn from the facts found by him to be proved.[76] A presumption supports the original findings, but the power or prerogative of the Deputy with reference to resolving conflicts, is not absolute and is always subject to review by the Full Commission and the supreme court. However, those findings will not be disturbed unless the reviewing authority becomes convinced that the Deputy has gone afield.

In the selection of medical testimony and where there is a clear conflict, the Deputy Commissioner has the discretionary right to accept the testimony of one doctor over that of one or more of his colleagues. This discretion must be rooted in a firm foundation of fact to support the opinion of the expert upon whom the Deputy chooses to rely.[77] In addition, the cases require the Deputy to explain his reasons for accepting the testimony of one qualified physician over the testimony of another.[78]

It is also the responsibility of Deputy Commissioners to adjudicate issues properly presented to them,[79] and to refrain from entering orders without testimony or other evidentiary support.[80]

73. Milne v. Florida Indus. Comm'n, 188 So.2d 798 (Fla. 1966); Warren Barr Supply Co. v. Taylor, 182 So.2d 14 (Fla. 1966); Crowell v. Messana Contractors, 180 So.2d 329 (Fla. 1965).

74. Pratt & Whitney Aircraft v. Golas, 192 So.2d 759 (Fla. 1966); Hammersla v. Price, 190 So.2d 765 (Fla. 1966); Milne v. Florida Indus. Comm'n, 188 So.2d 798 (Fla. 1966); Kurtz v. Wall, 182 So.2d 618 (Fla. 1966); Conrad v. Six L's Packing Co., 182 So.2d 616 (Fla. 1966); Vandiner v. Watford, 178 So.2d 195 (Fla. 1965).

75. Outrigger Inn v. Reser, 198 So.2d 28 (Fla. 1967); Scott v. Grondlin Remodeling Co., 178 So.2d 8 (Fla. 1965); Garcia v. Continental Vending Mach. Corp., 176 So.2d 329 (Fla. 1965).

76. Gladsten County Bd. of Pub. Instr. v. Dickson, 191 So.2d 562 (Fla. 1966); Annheuser-Busch, Inc., v. Redner, 198 So.2d 321 (Fla. 1967); Peltier v. H.H. Barbour, 190 So.2d 569 (Fla. 1966).

77. Crowell v. Messana Contractors, 180 So.2d 329 (Fla. 1965) (court not convinced that Deputy went so far afield in his analysis of what was said by doctors so as to justify interference with the findings); Geiger Distribs., Inc. v. Snow, 186 So.2d 507 (Fla. 1966); Herrin Transp. Co. v. Gothren, 180 So.2d 338 (Fla. 1965).

78. St. Francis Hosp., Inc. v. Feinberg, 192 So.2d 753 (Fla. 1966); Gonci v. Panelfab Prods., Inc., 179 So.2d 856 (Fla. 1956) (credibility of witnesses also to be determined by the Deputy Commissioner).

79. Pratt & Whitney Aircraft v. Golis, 192 So.2d 759 (Fla. 1966).

80. Bilton v. Bilton, 181 So.2d 533 (Fla. 1965).

In *Kirk v. Publix Super Markets*,[81] a claimant was ordered to submit to a physical examination and to produce copies of the reports of physicians who had previously examined and treated him. Upon the claimant's refusal to produce the copies of the physicians' reports, the Deputy Commissioner entered an order denying the claim and dismissing it without prejudice. The order further required that no consideration would be given to any new claim until the claimant complied with the order to produce. In reversing the Deputy's dismissal of the claim, it was held by the Supreme Court of Florida that the Deputy had no such authority but that he would have to seek enforcement of his order through the circuit court, which court, after hearing evidence, could punish for contempt. The Deputy has quasi-judicial discretion to hear additional testimony on remands if the order remanding the matter does not preclude the Deputy from so doing.[82]

## X. THE FULL COMMISSION

In its function as a appellate review body, the Full Commission has the duty of determining whether the Deputy Commissioner properly fulfilled his function with reference to the evidence supporting the findings and the law applied to the findings. Questions of fact cannot be changed into questions of law in order to skirt the competent substantial evidence rule supporting Deputy Commissioners' orders.[83] The Full Commission must adhere to the findings of fact made by the Deputy Commissioner unless there is no competent substantial evidence to support them.[84]

Questions directly raised in an application for review before the Full Commission must be dealt with by the Full Commission and their failure to do so is error.[85] Indication was given in *Milne v. Florida Industrial Commission*[86] that the Full Commission must evaluate the *existence* of competent substantial evidence. It is questionable whether the customary practice of short-form orders fulfills the duty imposed upon the Full Commission to determine whether the Deputy Commissioner properly fulfilled his function with reference to the evidence required to support the findings and the law applied to the findings.[87]

81. 185 So.2d 161 (Fla. 1966).

82. Barber v. Florida Indus. Comm'n, 195 So.2d 557 (Fla. 1967); Outrigger Inn v. Reser, 198 So.2d 28 (Fla. 1967); Griffin v. Jarvis Pharmacy, 197 So.2d 821 (Fla. 1967).

83. Thompson v. Swift & Co., 198 So.2d 826 (Fla. 1967); Peltier v. H.H. Barbour, 190 So.2d 569 (Fla. 1966); Hastings v. City of Fort Lauderdale, 178 So.2d 106 (Fla. 1965).

84. Evans v. Florida Indus. Comm'n, 196 So.2d 748 (Fla. 1967) (substituted its view and judgment for that of the Deputy); Fleischer's Inc. v. Bryant, 196 So.2d 418 (Fla. 1967) (Commission redetermined the issues which was beyond the scope of its authority); Hammersla v. Price, 190 So.2d 765 (Fla. 1966) (substituted its judgment for the facts for those of the Deputy Commissioner); Creighton v. Sears-Roebuck & Co., 190 So.2d 762 (Fla. 1966); Warren Barr Supply Co. v. Taylor, 182 So.2d 14 (Fla. 1966); Crowell v. Messana Contractors, 180 So.2d 329 (Fla. 1965).

85. Barnes v. International Paper Co., 184 So.2d 168 (Fla. 1966).

86. 188 So.2d 798 (Fla. 1966).

87. Thompson v. Swift & Co., 198 So.2d 826 (Fla. 1967) (duty set forth); Warren Barr

## XI. Review by the Supreme Court

Judicial review of Industrial Commission orders has not changed.[88] Final orders of the Full Commission are reviewable only by the Supreme Court of Florida, which limits the scope of its review to a determination of whether or not the Commission properly fulfilled its function with reference to the evidence required to support the findings made by the Deputy and the law applied to the findings.[89]

## XII. Modification

Little activity has transpired in the period surveyed regarding modifications of prior Workmen's Compensation awards. In *Maldonado v. Keller Metal Products*,[90] modification was permitted for a claimant whose medical disability could not be improved through requested surgery, but whose wage-earning capacity could be improved as a result thereof. In bodily injury cases prior to the 1965 amendment of Florida Statutes, section 440.15(3)(u), modification could be had only where there was a showing of increased loss of wage earning capacity.[91]

## XIII. Attorneys' Fees

Entitlement to attorneys' fees, to be assessed against the employer or carrier for claimant's attorney, is contingent upon a showing of some service to claimant. Without such a showing, attorneys' fees are not awardable.[92] In *Steel v. A.D.H. Building Contractors*,[93] attorneys' fees were found to be assessable against an employer and carrier in enforcement proceedings in the circuit court pursuant to a rule nisi and also assessable in the appellate proceedings in the district court of appeal to review the circuit court's ruling on the rule nisi.

Awards of attorneys' fees in the amount of 5,200 dollars in a permanent total disability award,[94] 4,250 dollars in a death claim[95] and

Supply Co. v. Taylor, 182 So.2d 14 (Fla. 1966) (lengthy Order of Commission affirming Deputy commended); Scott v. Grondlin Remodeling Co., 178 So.2d 8 (Fla. 1965) (helpful if Commission would specifically outline its reasons for reversal of Deputy).

88. See prior surveys cited note 2 *supra*.

89. Hammersla v. Price, 190 So.2d 765 (Fla. 1966) (court will not review the evidence to formulate a set of factual findings); Garcia v. Continental Vending Mach. Corp., 176 So.2d 329 (Fla. 1965). *See* Anheuser-Busch, Inc. v. Redner, 198 So.2d 321 (Fla. 1967).

90. 185 So.2d 702 (Fla. 1966).

91. Cheathem v. The Fruit Bowl, Inc., 194 So.2d 171 (Fla. 1966) (weak factual situation justified reversal of modification award); Tropical Brick Co., Inc. v. Jackson, 188 So.2d 289 (Fla. 1966).

92. Clark v. Western Knapp Eng'r Co., 190 So.2d 334 (Fla. 1966) (recovery of medical expense sufficient to justify assessment of attorney's fees); *Accord*, Mansell v. Mulberry Constr. Co., 196 So.2d 436 (Fla. 1967); Poyntz v. William Adeimy, Inc., 190 So.2d 745 (Fla. 1966) (attorney's fee assessable for obtaining payment of medical expert witness fee); Drum v. Pure Oil Co., 184 So.2d 196 (Fla. 1966).

93. 196 So.2d 430 (Fla. 1967).

94. Warren Barr Supply Co. v. Taylor, 182 So.2d 14 (Fla. 1966).

95. Hastings v. City of Fort Lauderdale, 178 So.2d 106 (Fla. 1965).

15,000 dollars in a permanent total award were found not to be excessive under the circumstances of the particular cases.[96]

## XIV. WAIVER

Only two cases utilizing the doctrine of waiver or estoppel were decided in the period surveyed. In the first case, an employer was found to have waived the defense of non-coverage and was estopped to raise it when the employer brought the claimant to the United States and offered to furnish medical treatment pursuant to the Florida Workmen's Compensation Act which was in fact furnished.[97] In the second case, it was held that the requirement to furnish medical reports within ten days was waived where the employer knew of respondent's injury and took him to the treating doctor, knew and acquiesced in the original treatment, the resumption of the treatment and the second resumption of treatment.[98]

## XV. PENALTIES

Where penalties are claimed, a failure to offer evidence to excuse their assessment will require the assessment of the penalties.[99] However, penalties for failure to timely pay compensation as distinguished from payment of an award have been limited to temporary disability benefits only as distinguished from permanent disability benefits.[100]

## XVI. PROCEDURE

Since the last survey, the procedure in the presentation and handling of Workmen's Compensation claims has been unchanged. The burden of proof is upon the claimant to prove causal connection between his employment and his injury, there being no presumption that the injury for which compensation is claimed is causally connected with the employment.[101] In death cases, the fact of death and time of death must be proved as well as other material facts and they may be established by circumstantial evidence. The proof of this issue in compensation claims, as in our civil cases, generally is sufficient if the circumstantial evidence amounts to a preponderance of all reasonable inferences that can be drawn from the circumstances in evidence to the end that the evidence is

96. Ford v. Pesto, 198 So.2d 315 (Fla. 1967) (attorney's fee found high but not grossly excessive); Hardware Mut. Cas. Co. v. Sutton, 197 So.2d 502 (Fla. 1967).

97. Blair v. Gerrits, Inc., 193 So.2d 172 (Fla. 1966).

98. Geiger Distribs., Inc. v. Snow, 186 So.2d 507 (Fla. 1966).

99. G. & L. Motor Corp. v. Taylor, 182 So.2d 609 (Fla. 1966).

100. Massey v. Haynie, 180 So.2d 331 (Fla. 1965) (the rationale excluding permanent disability from the operation of penalties because of the difficulty in determining permanent disability may have been obviated by the 1965 amendment to section 440.15(3)(u)).

101. Gladsen County Bd. of Pub. Instr. v. Dixon, 191 So.2d 562 (Fla. 1966). However, claimant is not required to prove causal relationship by a preponderance of the evidence, Simmons v. Stanley, 197 So.2d 514 (Fla. 1967).

not susceptible to two equally reasonable inferences.[102] The evidence presented to the Deputy must be of sufficient quality and quantity to meet the competent substantial evidence test.[103]

Workmen's Compensation claims, as well as petitions for modifications must contain sufficient information to comply with the statutory requirements so that if the statements contained therein are proven, they would justify the relief sought.[104] On the other hand, the total failure on the part of an employer or carrier to file a notice to controvert has been held not to constitute a default upon which a claim proceeds ex parte.[105]

The utilization of stipulations was again encouraged in the case of *Tropical Brick Company, Inc. v. Jackson.*[106] In that case, the parties stipulated that the claimant's future medical care would be given by two specific doctors. Subsequent to the entry of the stipulation, claimant returned to the two doctors, both of whom declined to furnish him medical care. In a modification proceeding, the Deputy Commissioner ordered the claimant to receive his further medical care under the direction of physicians other than the two previously stipulated to. In reversing the Deputy Commissioner, the court pointed out that the stipulation was deserving of much more weight than was afforded it and had the Deputy followed it faithfully, he would have come to a contrary result.

In *Melbourne Airways & Air College, Inc. v. Thompson,*[107] a claimants deposition was permitted to be used in lieu of her personal appearance at the hearing. In addition, documentary evidence of a federal administrative determination of death was also admitted into evidence. In reviewing the procedure, the court affirmed, stating they could find no abuse of the Deputy's discretion in his admission of the deposition and documentary evidence.

At the appellate level, the Commission does not have the power to order an employer to pay the cost of a transcript furnished to an indigent claimant by the Commission in the event the claimant prevails on appeal.[108]

The concept of harmless error in appellate proceedings has been utilized by the Full Commission and by the Supreme Court of Florida on two separate occasions during the period surveyed.[109] In *Direct Oil Corporation v. Brown,*[110] the court held that it would not review orders of

102. Melbourne Airways & Air College Inc. v. Thompson, 190 So.2d 305 (Fla. 1966).
103. Apgar & Markham Constr. Co. v. Golden, 190 So.2d 323 (Fla. 1966).
104. Hood's Dairy v. Severino, 178 So.2d 588 (Fla. 1965).
105. St. Francis Hosp., Inc. v. Feinberg, 192 So.2d 753 (Fla. 1966).
106. 190 So.2d 305 (Fla. 1966).
107. Melbourne Airways & Air College, Inc. v. Thompson, 190 So.2d 305 (Fla. 1966).
108. Parrott v. City of Fort Lauderdale, 190 So.2d 326 (Fla. 1966).
109. Fernandez v. Anheuser-Busch, Inc., 197 So.2d 489 (Fla. 1967); Milne v. Florida Indus. Comm'n, 188 So.2d 798 (Fla. 1966).
110. 178 So.2d 13 (Fla. 1965).

the Full Commission which had not become final and that it would not review the correctness of the reasoning of the Full Commission's order, but only the correctness of the order itself. Further, through dictum, indication was given that the Full Commission could not review interlocutory orders of its Deputy Commissioners.

The procedure prescribed by the statute for the filing of medical reports[111] has again been subject to interpretation on four different occasions. The court has stated that the claimant shares with the physician the responsibility of the filing of reports or justifying the failure to do so. The failure of the Mayo Clinic to file medical reports was initially excused by the Deputy, but reversed upon review in the case of *Hoods Dairy v. Serverino*.[112] Because of protracted litigation and a confused legal situation, the ten-day statutory requirement was excused by the Deputy Commissioner and affirmed by the court in *Hardware Mutual Casualty Company v. Sharon Sutton*.[113]

## XVII. THIRD PARTIES AND SUBROGATION

Various attempts have been made to escape the exclusive remedy Doctrine of the Workmen's Compensation Act which limits injured employees to Workmen's Compensation benefits. Citing *Holly v. A.G. Wimpey*,[114] an injured employee attempted to classify a hauler of lime rock as a materialman. The attempt was denied, the court holding the would-be defendant a sub-contractor and thus protected by the exclusive remedy doctrine. Third party lawsuits by an employee of one sub-contractor against another sub-contractor[115] and by injured employees of a general contractor against a sub-contractor[116] were similarly dismissed. In *Smith v. Ryder Truck Rentals, Inc.*,[117] the plaintiff was injured by a fellow employee, both of whom were riding on a rented motorcycle which their employer leased from the would-be defendant. The lawsuit was dismissed by the court which held that the defendant was not vicariously liable under the dangerous instrumentality doctrine.

An injured employee's refusal to accept compensation does not create a third party liability action against a sub-contractor which the Workmen's Compensation Act precludes.[118] However, where an injured work-

111. FLA. STAT. § 440.13 (1967).

112. 178 So.2d 588 (Fla. 1965). For an opinion as to what does not constitute good cause, see St. Francis Hosp., Inc. v. Feinberg, 192 So.2d 753 (Fla. 1966).

113. 197 So.2d 502 (Fla. 1967); Geiger Distribs., Inc. v. Snow, 186 So.2d 507 (Fla. 1966) (10 day rule held waived).

114. 192 So.2d 508 (Fla. 3d Dist. 1966); Vargo v. Carter, 188 So.2d 402 (Fla. 4th Dist. 1966) (driver of a truck leased by its owner to a general contractor held not to be a materialman).

115. Carter v. Simms Crane Serv., Inc., 198 So.2d 25 (Fla. 1967).

116. Shirley v. Asbell, 197 So.2d 828 (Fla. 1st Dist. 1967).

117. 176 So.2d 599 (Fla. 3d Dist. 1965), *aff'd*, 182 So.2d 422 (Fla. 1966).

118. Gross v. Rudy's Stone Co., Inc., 179 So.2d 603 (Fla. 1st Dist. 1965).

man detrimentally changes his position by failing to file a claim for Workmen's Compensation in reliance upon a supplier's assertion of no compensation coverage, the supplier has been held to be estopped from subsequently raising the exclusiveness of liability provisions of the Workmen's Compensation Act when a third party action is brought.[119]

The fact that the injured workman and would-be defendant are working on the same project does not make them employees of a common employer. In *Foulk v. Perkins*,[120] the widow of a deceased employee recovered damages against defendants who were claiming to be statutory fellow employees of the deceased's employer.

The subrogated interests of a workmen's compensation carrier in a third party lawsuit has been lost by the failure to timely file a claim of lien therein.[121] However, the filing of the lien after a verdict and subsequent settlement but prior to the filing of a satisfaction of judgment is sufficient to preserve the subrogated interests.[122] The settlement of a third party action without notice to the compensation carrier does not destroy their subrogated interests nor limit them to equitable distribution.[123] In *American Mutual Liability Insurance Company v. City of West Palm Beach*,[124] the workman was injured due to alleged negligence of the City of West Palm Beach. He was paid Workmen's Compensation benefits by the workmen's compensation carrier and expressed his desire not to sue the City of West Palm Beach. One day less than a year from the date of the accident, the workmen's compensation carrier instituted a lawsuit in order to recover its subrogated interests. Their right to do so did not accrue until after the one year period. The defendant City of West Palm Beach, had limited liability and could not be sued after one year. In dismissing the lawsuit, the district court of appeal held that compensation carrier's subrogation rights were limited by statute and that the conflict in the statutes which, in effect, deprived the carrier of its subrogated right, though inequitable, was a matter for the legislature.

## XVIII. Additional Decisions of Interest

In *Lewis Manufacturing Company v. Brown*,[125] the filing of a Petition for extension of time, pursuant to the provisions of Rule 3 of the Florida Industrial Commission Rules of Proedure was held insufficient to prevent operation of the requirements of Rules 3 and 11.

119. Quality Shell Homes & Supply Co. v. Roley, 186 So.2d 837 (Fla. 1st Dist. 1966).
120. 181 So.2d 704 (Fla. 2d Dist. 1966).
121. Cook Motor Co. v. Vaughn, 189 So.2d 536 (Fla. 1st Dist. 1966).
122. Maryland Cas. Co. v. Simmons, 193 So.2d 446 (Fla. 2d Dist. 1966).
123. Bituminous Cas. Co. v. Florida Power & Light Co., 190 So.2d 426 (Fla. 4th Dist. 1966).
124. 185 So.2d 174 (Fla. 4th Dist. 1966).
125. 198 So.2d 329 (Fla. 1967).

In *Shell v. City of Miami*,[126] the City of Miami adopted a procedure whereby it paid its injured employees full salary during temporary total disability. All salary payments made over and above the compensation due for the particular weeks of temporary disability were designated as "advance payments" of compensation. Upon determination that the employee had a permanent disability, the "advance payments" were applied as a credit against the permanent disability. In accordance with the prevailing view of courts when constructing similar provisions, the court struck the procedure and limited the credit of "advance payments" to payments in the amount of, and within, the time for disability compensation of that class ultimately found to be due.

## XIV. CONCLUSION

The two year period surveyed has brought little legislative or judicial change to the Florida Workmen's Compensation Act. The doctrine of apportionment has undergone drastic judicial revision which should eventually reduce litigation for those employees suffering from pre-existing impairments or diseases.

The pressing workload of the Supreme Court of Florida is reflected in the increased number of Workmen's Compensation cases where petitions for writ or certiorari are denied without opinion. It is foreseeable that new methods of judicial review will ultimately become necessary should the workload of the Court not diminish.

126. 193 So.2d 170 (Fla. 1966).